Supplemental Petitioner's Brief

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NO. 81-89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WALTER ZANT, WARDEN,
Petitioner,

v.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT AND CITATION OF AUTHORITY .	3
CONCLUSION	17
CERTIFICATE OF SERVICE	20

TABLE OF AUTHORITIES

Cases cited: Page(s)

Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980) 16

Stromberg v. California, 283 U.S. 359 (1931) 15

Zant v. Stephens, ___U.S.___, 72 L.Ed.2d 226 (1982). 3,4

Zant v. Stephens, Case No. 38763 (Supreme Court of Georgia, decided 10-27-82). . . 5,11

Statutes cited:

O.C.G.A. § 15-2-9(a); Ga. Code Ann. § 24-4536(a) 4,17

O.C.G.A. § 17-10-30(a); Ga. Code Ann. § 27-2534.1 7

O.C.G.A. § 17-10-35; Ga. Code Ann. § 27-2537 10

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INTRODUCTION

By order dated November 15, 1982 this Court invited supplemental memoranda from the parties addressing (1) the October 27, 1982 opinion of the Supreme Court of Georgia rendered in response to this Court's May 3, 1982 Certified Question,

and (2) the effect of the Supreme Court of Georgia's October 27, 1982 opinion on this instant case. Set forth below is the supplemental memorandum of Petitioner Walter Zant.

ARGUMENT AND CITATION OF AUTHORITY

In its May 3, 1982 opinion this Court defined the issue that confronted it as follows:

> Today, we are asked to decide whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence. Zant v. Stephens, ___U.S.___, 72 L.Ed.2d 226 (1982).

While in the process of defining the issue for resolution, this Court noted that while the Supreme Court of Georgia had clearly and consistently asserted the authority to sustain a death sentence under the circumstances described above, the premise of this state-law rule remained rather uncertain.

> The Georgia Supreme Court consistently has asserted

> that authority. Its construction of state law is clear: 'Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstances found and the sentence of death based thereon." (Cite omitted).
>
> Despite the clarity of the state rule we are asked to review, there is considerable uncertainty about the state-law premises of that rule. The Georgia Supreme Court has never explained the rationale for its position. Zant v. Stephens, supra, at 226-227.

Recognizing that ". . . the state-law premises of the Georgia Supreme Court's conclusion of state law are relevant to the constitutional issue at hand," this Court invoked O.C.G.A. § 15-2-9(a); Ga. Code Ann. § 24-4536(a) and certified to the Supreme Court of Georgia the following question.

> What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury? Zant v. Stephens, supra at 227-228.

In response to the certified question the Supreme Court of Georgia very descriptively set forth the premises of the state-law rule via an analogy to a pyramid. Zant v. Stephens, Case No. 38763 (Supreme Court of Georgia, decided 10-27-82). Noting that all cases of homicide are contained within the pyramid, the consequences flowing to the perpetrator differ however, depending upon his or her location in the pyramid. Severity of punishment increases from base to apex with the death penalty applying only to those few cases which are contained in the space just beneath the apex.

In order to reach that position in the pyramid, a case must pass through three planes of division which exist between the base and the apex.

The first plane above the base separates from all homicide cases those which fall into the statutory definition of murder, as opposed to voluntary or involuntary manslaugher and justifiable homicide. In deciding whether a given case falls above or below this first plane the function of the trier of facts is limited to finding facts. Additionally, this plane remains fixed unless moved by legislative act.

The second plane separates from all murder cases contained in the first plane, in which cases the only punishment to be imposed is life imprisonment, those few cases in which death may be

considered as a possible punishment. In order to move a murder case from the first plane, i.e., life imprisonment, to the second plane, authorization to consider death as a possible punishment, the factfinder must first find the existence beyond a reasonable doubt of at least one statutory aggravating circumstance.[1/] O.C.G.A. § 17-10-30(a);

1/ In cases of treason or highjacking the finding beyond a reasonable doubt of at least one statutory aggravating circumstance is not a prerequisite to the factfinder's authority to consider death as a possible punishment.

Ga. Code Ann. § 27-2534.1. Additionally, this plane is established by the definition or definitions of the applicable statutory aggravating circumstance or circumstances.

The third plane separates from all of those murder cases in which a penalty of death may be imposed, i.e., those cases in the second plane, those few murder cases in which a death penalty shall be imposed.[2/] Unlike the preceeding planes, this plane is established by the

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2/ There exists in the findfinder the absolute discretion not to recommend imposition of the death penalty, i.e., not to place a murder case in the third plane.

factfinder after consideration of all evidence in extenuation, mitigation and aggravation of punishment submitted during both phases of trial.[3/] The factfinder moves a case from the second plane to the third plane by returning a recommendation that death be imposed as the appropriate

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3/ Petitioner notes that a major fallacy which defectively permeates Respondent's argument is Respondent's erroneous assumption that under Georgia law the factfinder in a capital case is limited to the consideration of the statutory aggravating circumstance or circumstances as the sole source of evidence in aggravation of punishment. Quite the contrary, the factfinder may consider as aggravating any evidence it finds to be so, without regard to which phase of trial upon which the evidence was properly admitted. (Respondent's Brief at 26).

punishment.[4/]

With the foregoing analogy in mind, it is apparent that the primary function of a statutory aggravating circumstance is to limit the factfinder's discretion.

> Unless at least one of the ten statutory aggravating circumstances exists, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty

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4/ The final limitation on the factfinder's authority to move a case from the second to the third plane is the appellate review conducted by the Supreme Court of Georgia on automatic appeal so as to determine whether the penalty of death was imposed under the influence of passion, prejudice or any other arbitrary factor; whether the statutory aggravating circumstances are supported by the evidence, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. O.C.G.A. § 17-10-35; Ga. Code Ann. § 27-2537.

may be imposed but the fact-finder has the discretion to decline to do so without giving any reason. (Cites omitted). In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate to the offense and the defendant.

A case may not pass the second plane into that area in which the death penalty is authorized unless at least one statutory aggravating circumstance is found. However, this plane is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one. Once beyond this plane, the case enters the area of the fact-finder's discretion, in which all the facts and circumstances of the case determine, in terms of our metaphor, whether or not the case passes the third plane and into the area in which the death penalty is imposed. Zant v. Stephens, Case No. 38763 (Supreme Court of Georgia, decided 10-27-82).

As has been exhaustively argued by the Petitioner, and its possibility noted by this Court at page 227 of its May 3, 1982 opinion, the factfinder's findings of multiple statutory aggravating circumstances are superfluous so long as at least one statutory aggravating circumstance is properly found, thus authorizing the passage of a murder case from the first plane, in which cases the only punishment is life imprisonment, to the second plane, i.e., those cases in which death may be considered as a possible punishment.

Once a case has passed into the second plane the factfinder makes its recommendation of the appropriate punishment to be imposed based not upon the statutory aggravating circumstance or circumstances, but rather upon all of that evidence in extenuation,

mitigation and aggravation of punishment introduced at both phases of trial.[5/] In this regard Petitioner notes that after the statutory aggravating circumstance has served its primary purpose, i.e., to narrow, guide and channel the factfinder's discretion by focusing the factfinder's attention on the particular nature of the crime and the particular characteristics of the individual defendant [Gregg v. Georgia, 428 U.S. 153, 206 (1976)], the factfinder is still free to consider as evidence in aggravation

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5/ In its charge to the jury the trial court charged that in arriving at the appropriate punishment to be imposed the jury was authorized to consider all facts and circumstances in mitigation, extenuation and aggravation introduced at both phases of the trial. The trial court charged the definitions of the offered statutory aggravating circumstances and instructed the jury that the finding beyond a reasonable doubt of at least one of the offered statutory aggravating circumstances was a prerequisite to its consideration of death as a possible punishment.

of punishment all of that evidence properly introduced in support of the statutory aggravating circumstance. Thus, as argued by Petitioner at page 13 of his principal brief, because the jury's recommendation of death was based not upon the statutory aggravating circumstance, but rather upon all of the evidence before the jury in aggravation and mitigation of punishment that was properly introduced at both phases of trial, absent the removal of some material piece of evidence in aggravation or mitigation of punishment which was considered by the jury, the setting aside of less than all of the statutory aggravating circumstances found by the jury works absolutely no effect upon the jury's process of deliberation in reaching their recommendation of the appropriate punishment. Neither does the setting aside of less than all of the statutory

aggravating circumstances found by the jury render this case unsubjectable to rational appellate review as all of that evidence considered by the jury in reaching its decision on punishment is contained in the record before this Court.

Additionally, as correctly noted by the Supreme Court of Georgia in its opinion rendered in response to the Certified Question from this Court, Stromberg v. California, 283 U.S. 359, 367-368 (1931) is totally inapplicable to this instant case. Unlike in Stromberg, supra, where the verdict may have rested on an invalid ground or at least may have rested on an invalid ground and a valid ground which were intertwined, in this instant case the factfinder's recommendation of death was legally authorized by two admittedly valid and properly found

statutory aggravating circumstances which the factfinder designated in writing.[6/]

6/ In Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980) the court conceded that the two remaining statutory aggravating circumstances were properly found and that either of the two would legally authorize a recommendation of death as an appropriate punishment.

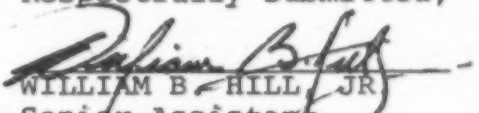
CONCLUSION

This Court properly certified the subject question to the Supreme Court of Georgia under the authority of O.C.G.A. § 15-2-9(a); Ga. Code Ann. § 24-4536(a) as the Supreme Court of Georgia's statement of the premises for the state-law rule at issue is ". . . determinative of said cause . . .." O.C.G.A. § 15-2-9(a); Ga. Code Ann. § 24-2536(a). The highest court of the State of Georgia having clearly and concisely defined the purpose and functions of statutory aggravating circumstances under Georgia law, there can be no doubt but that in this instant case the factfinder was properly

authorized to consider death as a possible punishment and that after consideration of all evidence in mitigation, extenuation and aggravation of punishment introduced at both phases of trial, Respondent's sentence of death was properly imposed. Additionally, because the removal by an appellate court of less than all of the statutory aggravating circumstances found by the factfinder has removed not one single item of evidence which was considered by the factfinder during deliberations on punishment, the factfinder's discretion and attention in this case were properly channeled and focused, and the process by which the death penalty was imposed is rationally reviewable.

Accordingly, the decision of the lower court should be reversed.

Respectfully submitted,



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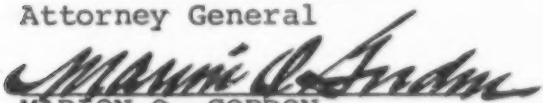

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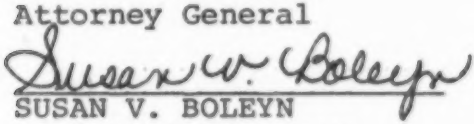

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I, William B. Hill, Jr., Attorney of Record for the Petitioner and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have served three copies of this Supplemental Memorandum for Petitioner upon the Respondent by depositing the same in the United States mail with sufficient, first-class postage affixed and addressed to counsel for Respondent as follows:

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Supplemental Respondent's Brief

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the trial court's submission to respondent Stephens' sentencing jury of a statutory aggravating circumstance later held to be unconstitutional creates an unacceptable risk that his jury—which expressly designated that circumstance in its verdict calling for a death sentence—may have rested its sentencing decision in part upon a constitutionally invalid ground?

2. Whether a death sentence is constitutional under *Furman v. Georgia* if imposed pursuant to a sentencing scheme that permits a jury "absolute discretion" in its sentencing decision, without any further channelling or guidance by legislatively defined aggravating circumstances, once the jury has found the single statutory aggravating circumstance which is required in order to make any defendant death-eligible and therefore cannot serve to guide selection *among* death-eligible defendants?

3. Whether Stephens' death sentence can be upheld if reasonable jurors may have interpreted the trial court's sentencing instructions in a manner that would make it impossible for a reviewing Court to discern whether the jurors relied in part on an unconstitutional aggravating circumstance?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
OPINIONS BELOW 1
JURISDICTION 2
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 6
ARGUMENT
I. THE GEORGIA SUPREME COURT HAS UTTERLY FAILED TO DISTINGUISH *STROMBERG v. CALIFORNIA* AND *STREET v. NEW YORK*, WHICH CONTROL THIS CASE AND REQUIRE THAT RESPONDENT STEPHENS BE RESENTENCED BY A PROPERLY INSTRUCTED JURY 8
II. IF THIS COURT ACCEPTS THE "STATE-LAW PREMISES" ANNOUNCED BY THE GEORGIA SUPREME COURT TO JUSTIFY STEPHENS' DEATH SENTENCE, IT MUST CONCLUDE THAT STEPHENS' SENTENCE WAS IMPOSED UNDER PROCEDURES THAT PLAINLY VIOLATE *FURMAN v. GEORGIA*..... 12
III. EVEN IF (i) *STROMBERG* AND *STREET* DID NOT SO CLEARLY APPLY TO STEPHENS' CASE, AND (ii) GEORGIA'S "STATE-LAW PREMISES" DID NOT RENDER STEPHENS' DEATH SENTENCE UNCONSTITUTIONAL, THE SENTENCE WOULD HAVE TO BE VACATED, SINCE STEPHENS' JURY WAS INSTRUCTED IN A MANNER CALCULATED TO CREATE THE RISK THAT IT RELIED AT LEAST IN PART ON AN UNCONSTITUTIONAL AGGRAVATING CIRCUMSTANCE..... 21
CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Cole v. Arkansas,
333 U.S. 196 (1948) 7,22

Coley v. State,
231 Ga. 829, 204 S.E.2d 612 (1974) 14

Delgado v. Connecticut,
408 U.S. 940 (1972) 19

Drake v. Zant,
449 U.S. 599 (1980) 14-15

Duling v. Ohio,
408 U.S. 936 (1972) 7,19

Eddings v. Oklahoma,
455 U.S. 104 (1982) 24

Fleming v. State,
240 Ga. 142, 240 S.E.2d 37 (1977) 10

Furman v. Georgia,
408 U.S. 238 (1972) ..... *passim*

Gilmore v. Utah,
429 U.S. 1012 (1976) 19

Godfrey v. Georgia,
446 U.S. 420 (1980) 21

Gregg v. Georgia,
428 U.S. 153 (1976) ..... *passim*

Hankerson v. North Carolina,
432 U.S. 233 (1977) 17

Hawes v. State,
240 Ga. 327, 240 S.E.2d 833 (1977) 10

Hicks v. Oklahoma,
447 U.S. 343 (1980) 17

Illinois v. Gates,
____ U.S. ____, 51 U.S.L.W. 3415 (U.S. Nov. 30, 1982) (No. 81-430) 17

Moore v. Illinois,
408 U.S. 786 (1972) 17,18,19

Presnell v. Georgia,
439 U.S. 14 (1979) *(per curiam)* 22

Harry Roberts v. Louisiana,
431 U.S. 633 (1977) 18

Sandstrom v. Montana,
442 U.S. 510 (1979) 8,23-24

Scoleri v. Pennsylvania,
408 U.S. 934 (1972) 19

Shuttlesworth v. City of Birmingham,
382 U.S. 87 (1965) 7,22,24

State v. Pierre,
572 P.2d 1338 (Utah 1977) 20

State v. Wood,
648 P.2d 71 (Utah 1982) 20

Street v. New York,
394 U.S. 576 (1969) ..... *passim*

Stromberg v. California,
283 U.S. 359 (1931) ..... *passim*

Woodson v. North Carolina,
428 U.S. 280 (1976) 3

Zant v. Stephens,
____ U.S. ____, 72 L.Ed.2d 222, 102 S.Ct. 1856 (1982) *(per curiam)* ..... *passim*

Zant v. Stephens,
____ U.S. ____, 51 U.S.L.W. 3378 (U.S. Nov. 16, 1982) (No. 81-89) 1

Zant v. Stephens,
No. 38763 (Ga. Oct. 27, 1982) ..... *passim*

Statutes

28 U.S.C. §1254(1) (1966) 2
Conn. Gen. Stat. Ann. §53-10 (1967) 19
Ga. Code Ann. §24-4536 (1981) 3
Ill. Ann. Stat. ch. 38 §1-7 (1964) 19
Ohio Rev. Code Ann. §2901-04 (1953) 19
Pa. Stat. Ann. tit. 18, §4701 (1965) 19
Utah Code Ann. §76-3-206 19
Utah Code Ann. §76-3-367 20
Utah Code Ann. §76-5-202 19-20

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SUPPLEMENTAL BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 631 F.2d 397 and appears in the Joint Appendix at J.A. 74. The opinion of the Court of Appeals on petition for rehearing is reported at 648 F.2d 446 and appears at J.A. 95. The opinion of the United States District Court for the Middle District of Georgia is unreported and appears at J.A. 68.

This Court's opinion after oral argument last Term, certifying a question to the Supreme Court of Georgia, is reported as *Zant v. Stephens*, ____ U.S. ____, 72 L.Ed.2d 222, 102 S.Ct. 1856 (1982) *(per curiam)*. The answer certified by the Supreme Court of Georgia is not yet reported. *Zant v. Stephens*, No. 38763 (Ga. Oct. 27, 1982).

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on November 26, 1980. An amended opinion was filed on June 18, 1981. Petitioner filed a timely petition for certiorari which this Court granted on October 5, 1981. 454 U.S. 814.

STATEMENT OF THE CASE

Facts concerning the crime, respondent Stephens' trial, and prior appeals, have been set forth in Stephens' principal brief, to which the Court is respectfully directed (Resp. Br., 4-19)[1] To summarize, Stephens challenged the constitutionality of his death sentence in the lower courts on the ground, *inter alia,* that it was imposed by a lay jury which was instructed to consider, and which returned a written verdict expressly indicating its reliance at least in part upon, a statutory aggravating circumstance subsequently determined by the Supreme Court of Georgia to be unconstitutional (Resp. Br., 14-16).

The United States Court of Appeals for the Fifth Circuit agreed with Stephens' contention that this impermissible factor fatally compromised the jury's sentencing deliberations, violating both the Eighth and the Fourteenth Amendments. The Fifth Circuit reasoned that since a sentence of death is not mandatory under Georgia law upon the finding of a valid aggravating circumstance, "[i]t is possible that even if the jurors believed that the other [valid] aggravating circumstances were established, they would not have recom-

[1]Each reference to the Brief for Respondent filed in the Court on December 20, 1981, will be indicated by the abbreviation "Resp. Br.," followed by the number of the page on which the reference may be found.

mended the death penalty but for" their partial reliance upon the "invalid ground" (J.A. 91). Declaring it to be "impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by . . . [the] unconstitutional statutory aggravating circumstance" (J.A. 90-91), the Fifth Circuit vacated Stephens' death sentence. The court drew both upon the "settled principle of law" first established by this Court in *Stromberg v. California,* 283 U.S. 359 (1931), and upon this Court's Eighth Amendment requirement in capital cases that "the sentencer's discretion be channeled by clear and objective standards that 'make rationally reviewable the process for imposing a sentence of death.' *Woodson v. North Carolina,* 428 U.S. at 303" (J.A. 90).

This Court thereafter granted the Georgia Attorney General's petition for certiorari, received briefs and entertained oral argument. On May 3, 1982, the Court deferred decision on the ultimate issue presented, and certified to the Supreme Court of Georgia, pursuant to Ga. Code Ann. §24-4536 (1981), the following question:

> "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?"

Zant v. Stephens, supra, ____ U.S. ____, 72 L.Ed.2d at 227-28. In explaining its certification, the Court observed that though "[t]he Georgia Supreme Court consistently has asserted . . . [the] authority" to uphold "a death sentence as long at least one of a plurality of statutory aggravating circumstances found by the jury is valid . . . there is considerable uncertainty about the state-law premises of that rule," *id.* at 226.

The Supreme Court of Georgia, after receiving briefs from the parties, answered the Court's certified question in an

opinion filed on October 27, 1982. *Zant v. Stephens,* No. 38763 (Ga. Oct. 27, 1982). This opinion first addressed Stephens' due process claim under *Stromberg v. California, supra.* Stromberg, the Georgia court observed, was prosecuted under an information which charged three statutory violations in a single count. When an appellate court held one of the three violations unconstitutional, the trial jury's "general verdict of guilty" did not disclose whether "the jury relied entirely upon the single invalid ground," *id.,* slip op. at 3, and the verdict had to be vacated. By contrast, the Georgia court reasoned, the fact that one of the three aggravating circumstances relied upon by Stephens' jury was later held unconstitutional "does not violate Stromberg," because the jury's written verdict form indicated that other, valid aggravating factors were also found by Stephens' jury and "it is known [that] the jury considered and found each ground on its own merits," *id.,* slip. op. at 4.

Turning to its state-law premises for rejecting Stephens' Eighth Amendment challenge, the Georgia court suggested that "it is helpful to consider the entire body of state law governing the subject matter of homicide . . . as contained within a pyramid," *id.* "All cases of homicide of every category are contained within the pyramid," which is graduated according to the severity of the sentence, "with the death penalty applying only to those few cases which are contained in the space just beneath the apex," *id.* Within this pyramid, the Georgia court explained, can be discerned "three planes of division between the base and apex," the first separating "from all homicide cases those which fall into the category of murder," *id.,* and the second separating "from all murder cases those in which the penalty of death is a possible punishment," *id.,* slip op. at 5. The jury determines whether a case falls above or below these first two

planes by "finding facts": first, by deciding whether a homicide fits the legislative definition of murder, voluntary manslaughter or some lesser crime; and second, by making a determination as to the existence of facts which meet the "statutory definitions of aggravating circumstances," *id.*, slip op. 4-5.

However, once a case has passed through the second plane, the Georgia court stated, a sentencing jury possesses "an absolute discretion . . . to place any given case" above or below "[t]he third plane [which] separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed," *id.*, slip op. at 5. The court emphasized that "[t]he [third] plane itself is established by the factfinder" after considering in its discretion "all evidence in extenuation, mitigation and aggravation of punishment," *id.*

Under the Georgia court's conception, while "[a] case may not pass the second plane into that area in which the death penalty is authorized unless at least one statutory aggravating circumstance is found . . . this plane is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one." *Id.*, slip op. at 6. Since two statutory aggravating circumstances were found by Stephens' jury, his case "enter[ed] the area of the factfinder's discretion, in which all the facts and circumstances of the case determine[d], in terms of our metaphor, whether or not the case passe[d] the third plane and into the area in which the death penalty . . . [was] imposed," *id.*

Noting that no evidence otherwise inadmissible had been placed before Stephens' jury by virtue of the admittedly unconstitutional statutory circumstance submitted to it, the Georgia court found that the trial court's express instruction directing the jurors to consider and return a written finding on that unconstitutional circumstance as part of its sentencing

deliberations "had . . . an inconsequential impact on the jury's decision regarding the death penalty" and did not constitute "an arbitrary factor" requiring reversal of Stephens' death sentence by the Georgia Supreme Court under its statutory sentence review responsibilities, *id.*, slip op. at 7.

SUMMARY OF ARGUMENT

Respondent Stephens contends that his death sentence, imposed by a jury which expressly indicated partial reliance on an unconstitutional aggravating circumstance, was appropriately vacated by the Fifth Circuit under *Stromberg v. California*, 283 U.S. 359 (1931). On certification from this Court, the Supreme Court of Georgia has articulated no state law premises to justify its failure to apply *Stromberg* due process principles to Stephens' case. Instead, the Georgia Court has unsuccessfully attempted to explain why, as a matter of *federal* law, *Stromberg* is inapplicable. The Georgia court's analysis, however, is gravely flawed. It confuses principles pertinent to special verdicts on multiple counts with the essentially "general" verdict rendered by Stephens' jury which, as the Georgia Supreme Court itself conceded, possessed "absolute discretion" to impose a life or a death sentence even after it found two other, valid aggravating circumstances. It is improper and speculative to conclude merely from the finding of valid aggravating circumstances that Stephens' jurors would necessarily have imposed a death sentence on him without their consideration of the unconstitutional factor. Because of the "unacceptable danger that the trier of fact [may] . . . have regarded the [constitutional and unconstitutional aggravating factors] . . . as

'intertwined' and have rested the [death sentence] . . . on both together," *Street v. New York,* 394 U.S. 576, 588 (1969), Stephens' sentence was properly vacated by the Fifth Circuit.

The Georgia Supreme Court did articulate "state-law premises" to explain why Eighth Amendment principles did not require the vacation of Stephens' sentence. But the novel reinterpretation of Georgia capital procedures which the court outlined not only contravenes this Court's assumptions in *Gregg v. Georgia,* 428 U.S. 153 (1976), but runs directly afoul of *Furman v. Georgia,* 408 U.S. 238 (1972). If this Court reaches this issue, it necessarily must conclude that Stephens' death sentence was imposed under a system so lacking in statutory channelling and legislative guidance that it invites the same arbitrariness and capriciousness condemned under indistinguishable state sentencing schemes in several post-*Furman* cases. *See, e.g., Duling v. Ohio,* 408 U.S. 936 (1972).

Even if Georgia's new-found sentencing scheme could survive a *Furman* challenge, moreover, Stephens' own death sentence would have to be vacated, for his trial jury was never instructed under the Georgia court's newly announced sentencing standards. The constitutionality of Stephens' sentence must be judged on the case as it was submitted to his jury. *Cole v. Arkansas,* 333 U.S. 196, 202 (1948); *Shuttlesworth v. City of Birmingham,* 382 U.S. 87, 92 (1965). Reasonable jurors hearing instructions in Stephens' case may well have understood that they were required carefully to weigh and consider *all* statutory aggravating factors found to exist before reaching their sentencing decision. If they adopted that interpretation, no reviewing court can now say that the unconstitutional aggravating factor specifically charged to them for their consideration did not play an important part in their decision to return a

death sentence. Thus under the due process principles addressed earlier, Stephens' sentence was appropriately vacated by the Fifth Circuit.

I

THE GEORGIA SUPREME COURT HAS UTTERLY FAILED TO DISTINGUISH *STROMBERG v. CALIFORNIA* AND *STREET v. NEW YORK*, WHICH CONTROL THIS CASE AND REQUIRE THAT RESPONDENT STEPHENS BE RESENTENCED BY A PROPERLY INSTRUCTED JURY

Respondent Stephens demonstrated in his earlier brief to this Court (see Resp. Br. 31-36) that an unbroken line of precedent—stretching from Chief Justice Hughes' opinion in 1931 in *Stromberg v. California,* 283 U.S. 359 (1931), through Justice Brennan's recent opinion for a unanimous Court in *Sandstrom v. Montana,* 442 U.S. 510, 526 (1979)—holds that any verdict imposed by a jury which has been instructed on several possible theories, one of which subsequently proves unconstitutional, must be reversed. The Court's well-settled principle applies equally to cases where the jury may have relied entirely on the unconstitutional ground and to cases where the jury may have relied *even in part* on an invalid factor:

> "[E]ven assuming that the record precludes the inference that appellant's conviction might have been based *solely* on [the unconstitutional ground]..., we are still bound to reverse if the conviction could have been based upon *both* [the unconstitutional] . . . and [the constitutional ground]... [because of the] unacceptable danger that the trier of fact will have regarded the two [grounds] . . . as 'intertwined' and have rested the conviction on both together."

Street v. New York, supra, 394 U.S. at 587-88 (emphasis in original).

In justification of its failure to honor these settled due process principles, the Supreme Court of Georgia neither sets forth nor relies upon *any* "premises of state law". Rather, the Georgia court attempts to explain why, as a matter of federal law, the principles do not apply to Stephens' sentencing verdict. Thus, Stephens' death sentence can be upheld only if, as a matter of federal constitutional law, the Georgia court is correct in its conclusion that *Stromberg* and *Street* do not apply.

Examination quickly reveals that the Georgia court's analysis of the controlling principles is faulty. The court first observes that the *Stromberg* jury returned a "general verdict of guilty" without any "special findings o[n] all three grounds" alleged in the State's information. *Zant v. Stephens, supra,* slip op. at 3. Turning next to *Street v. New York,* the Georgia court cites a passage in which Justice Harlan states that no possibility of error exists when an " 'indictment or information is in several counts' " and a jury's verdict shows separate " 'findings of guilt on certain of these counts, for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others,' " *id.* From these two citations, the Georgia court leaps to the conclusion that, since Stephens' verdict rested on three statutory grounds, each of them indicated in writing, "[t]he subsequent failure of one of these grounds does not violate Stromberg because it is known the jury considered and found each ground on its own merits," *id.,* slip op. at 4.

Lost in this overhasty analysis is the crucial fact that, under Georgia law, a finding of one or more statutory aggravating circumstances does not lead, without more, to

an automatic or mandatory death sentence. The "special findings" rendered by Stephens' jury could save the jury's verdict under *Street* only if the two findings of valid statutory aggravating circumstances *required* the jury to impose a death sentence. Only then could a reviewing court say with the requisite confidence that the jury's verdict of death rested solely and independently upon its finding of a valid aggravating circumstance. However, both the Georgia Supreme Court, see *Zant v. Stephens, supra,* slip op., 5-6, and the Attorney General, see Pet. Br., 7-8[2] concede, as they must, that under Georgia law a jury's finding of one or more valid statutory aggravating circumstances permits, but does *not* require, a sentence of death. *E.g., Hawes v. State,* 240 Ga. 327, 334-335, 240 S.E.2d 833, 839 (1977). Once the finding of a valid statutory aggravating circumstance is made, there remains for the jury the ultimate all-important question whether its verdict will be life or death. The preliminary findings may be viewed as "special verdicts," to be sure; but the ultimate life-or-death verdict is and can be nothing but a "general verdict" under *Stromberg* and *Street,* because it adds a second decision to, and does not follow inexorably from, the prior "special verdict."

In short, Georgia's "system for deciding whether a death sentence is to be given requires the jury to consider *two* issues in the sentencing phase." *Fleming v. State,* 240 Ga. 142, 146-147, 240 S.E.2d 37, 40-41 (1977) (emphasis added). The first issue—the existence *vel non* of at least one valid aggravating circumstance—is resolved by special-question verdicts. The second issue—whether to impose a

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[2]Each reference to the Brief for the Petitioner, filed in the Court on November 19, 1981, this case will be indicated by the abbreviation "Pet. Br.," followed by the number of the page on which the reference may be found.

sentence of life or death—is not. *That* issue, as the Georgia court's opinion in response to this Court's certified question makes quite clear, is resolved at a distinct "third plane," *Zant v. Stephens, supra,* slip op. at 5, which lies above the "second plane" at which the existence of statutory aggravating circumstances is specially found. At the third plane, which "separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed," the Georgia procedure reposes "an absolute discretion in the factfinder to place any given case below the plane and not impose death." *id.* What is this, if not the most general of general verdicts? See Resp. Br., 33, 46-47 & n.48. As the Fifth Circuit correctly observed:

> "It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the [invalid ground]."

(J.A. 91).

The written findings of Stephens' jury on which the Georgia court relied, far from exempting this case from the *Stromberg* rule, make the case stronger for reversal than either *Stromberg* or *Street.* In both of those cases, reversal was mandated to avoid an *unknown,* but possible risk of improper jury reliance. In Stephens' case a reviewing court need not guess about whether there was an "unacceptable danger" of improper reliance, *Street v. New York,* 394 U.S. at 588, for the Stephens jury's written verdict expressly indicates that the unconstitutional factor *did* play some part both in its deliberations and in its ultimate decision.

On well-established due process grounds, therefore, without any need to reach Stephens' Eighth Amendment claim or the Georgia Supreme Court's "state-law premises" designed to avoid that Eighth Amendment claim, this Court should affirm the judgment of the Fifth Circuit vacating Stephens' death sentence.

II

IF THIS COURT ACCEPTS THE "STATE-LAW PREMISES" ANNOUNCED BY THE GEORGIA SUPREME COURT TO JUSTIFY STEPHENS' DEATH SENTENCE, IT MUST CONCLUDE THAT STEPHENS' SENTENCE WAS IMPOSED UNDER PROCEDURES THAT PLAINLY VIOLATE *FURMAN v. GEORGIA*

In certifying Stephens' case to the Supreme Court of Georgia, this Court confessed "considerable uncertainty about the state-law premises" of the Georgia rule under which Stephens' death sentence was affirmed. *Zant v. Stephens, supra,* ____ U.S. ____, 72 L.Ed.2d at 226. One possible premise, which "the Georgia Attorney General offered as his understanding" during oral argument,[3] was that:

> "[t]he existence of one or more aggravating circumstances [serves as] . . . a threshold finding that authorizes the jury to consider imposing the death penalty; it serves as a bridge that takes the jury from the general class of all murders to the narrower class of offenses the state legislature had determined warrant the death penalty. After making the finding that the death penalty is a possible punishment, the jury then makes a separate finding whether the death penalty should be imposed. It bases this finding 'not upon the statutory aggravating circumstances, but upon all the evidence before the jury in aggravation and mitigation. . . .' "

Id. at ____, 72 L.Ed.2d at 227.

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[3]This "threshold" or "bridge" theory, although argued orally by the Georgia Attorney General, was not set forth in his brief to the Court on the merits. A variant of the theory did appear in the Brief of Several Attorneys General as *amici curiae* (see Atty. Gen Br. 9-14).

The Court reserved the question whether the Attorney General's novel interpretation of Georgia law would "undermine the confidence we expressed in *Gregg v. Georgia* . . . that the Georgia capital-sentencing system, as we understood it then, would avoid the arbitrary and capricious imposition of the death penalty and would otherwise pass constitutional muster," *id.* In raising that question, the Court apparently recognized that the Attorney General's theory sought to avoid Stephens' contentions only by renouncing in principle virtually every safeguard upon which the Court relied in 1976 to uphold the constitutionality of Georgia's capital statute. The Court was understandably disinclined to accept the Attorney General's new-found interpretation without confirmation from the Georgia Supreme Court.

The Eighth Amendment issue that was "premature," *id.*, when based only upon the Attorney General's submission to this Court, has now become timely in the wake of the Georgia's Supreme Court exposition of the "state-law premises" on which it upheld Stephens' death sentence. The court's interpretation of the Georgia statute coincides in many particulars with the Attorney General's theory. According to the Georgia Supreme Court, the sole function of Georgia's statutory aggravating circumstances is to "separate [ ] from all murder cases those in which the penalty of death is a possible punishment," *Zant v. Stephens, supra,* slip op. at 5. To accomplish this separation, the jury needs determine only that "there exists at least one statutory aggravating circumstance," supported by sufficient evidence. *Id.* at 6. After one statutory circumstance has been found, the sentencing jury has "an absolute discretion" to choose between the sentences of death or imprisonment in "any given case." *Id.* at 5. While the "first plane of division"

within Georgia's statutory scheme for punishing homicides (the plane which "separates from all homicide cases those which fall into the category of murder," *id.* at 4) is "established by the legislature in statutes defining terms such as murder, voluntary manslaughter, involuntary manslaughter, and justifiable homicide," and "remains fixed unless moved by legislative act," *id.*, and while the "second plane" (which "separates from all murder cases those in which the penalty of death is a possible punishment," *id.* at 5) also "is established by statutory definitions," namely, those "of aggravating circumstances," *id.*, the "third plane"—which "separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed," *id.*—is neither fixed nor governed in any way by legislated standards. "The plane itself is established by the factfinder." *Id.* Even the question whether one or more than one aggravating circumstances exist does not serve to guide the life-or-death decision made at this plane.[4]

At the time of *Gregg*, of course, this Court perceived a quite different and far more narrowly channelled sentencing scheme in the State of Georgia.[5] Justice White noted in

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[4]Counsel have been unable to find any prior Georgia case in which the "pyramid" theory—or the Attorney General's variant, the "bridge" or "threshold" theory—has ever been articulated or clearly relief upon. For example, in *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612 (1974)—the Georgia Supreme Court's principal decision upholding the constitutionality of Georgia's post-*Furman* capital statute—none of these concepts were either expressly mentioned or implied by the court's discussion.

[5]It is important to note that the Georgia Supreme Court did *not* espouse any statutory construction under which it, as an appellate court, might have the power to exercise independent sentencing authority. Although members of this Court may have assumed that the Georgia Supreme Court possessed such authority, see *Drake v. Zant*, 449 U.S.

(continued)

Gregg that "[t]he Georgia legislature has plainly made an effort to guide the jury in the exercise of its discretion" *Gregg v. Georgia,* 428 U.S. 153, 222 (1976) (concurring opinion of Justice White) by "identify[ing] those aggravating factors which it considers necessary and relevant," *id.* at 221, and instructing the jury "on all statutory aggravating factors which are supported by the evidence," *id.* at 222. Justices Stewart, Powell and Stevens likewise stressed the detailed guidance which they assumed would be provided to Georgia juries by the legislatively defined aggravating circumstances:

> "*[T]he provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used* . . . especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. . . . *It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.*"

Gregg v. Georgia, supra, 428 U.S. at 192 (opinion of Justices Stewart, Powell & Stevens) (emphasis added). Deeming it "virtually unthinkable to follow any other course in a legal system . . . operated by following prior precedents and fixed rules of law," this plurality opinion noted that "it is

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(footnote continued from preceding page)

999, 1002-03 (1980) (Justice White, dissenting); *id.* at 999-1000 (Justice Stevens concurring), the Georgia court itself has now clarified that, under Georgia law, the trial judge or jury alone can serve as "factfinders" with power to determine "those cases in which [death] . . . shall be imposed," *Zant v. Stephens, supra,* slip op. at 5. While the performance of its appellate review functions can "cause this Court to remove a case from the death penalty category [*it*] . . . *can never have the opposite result,*" *id.* (emphasis added).

quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations," *id.* at 193. "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines." *Id.* at 206-207. In sum, a majority of this Court contemplated in *Gregg* that the jury would be both "apprised of the information relevant to the imposition of sentence *and provided with standards to guide its use* of the information," *id.* at 195 (emphasis added).

Yet, as the Georgia Supreme Court has not interpretated its statute, once a jury has found any single aggravating circumstance, all statutory guidance is abandoned, and the designation of "factors [which] . . . the State, representing organized society, deems particularly relevant," simply counts for nothing. Instead the jury, exercising "absolute discretion" is set free to impose a life sentence or a death sentence for any reason, or for no reason at all.

Beyond Georgia's apparent provision of carefully limited sentencing guidelines, this Court in *Gregg* also relied upon "the further safeguard of meaningful appellate review . . . to ensure that death sentences are not imposed capriciously or in a freakish manner," *Gregg v. Georgia, supra,* 428 U.S. at 195; *accord. id.* at 222-24 (concurring opinion of Justice White). Meaningful appellate sentencing review seemed guaranteed by Georgia statutory procedures under which "the sentencing authority [was] . . . required to specify the factors it relied upon in reaching its decision," *id.* at 195, so that the Georgia Supreme Court could identify and vacate any death sentence "imposed under the influence of . . . any other arbitrary factor," *id.* at 204.

Yet the Georgia Supreme Court, faced here with an explicit jury finding which unmistakably indicated the jury's reliance upon an unconstitutional statutory aggravating circumstance, has now announced that this aggravating factor—upon which Stephens' jury was instructed and upon

which it returned a written finding—does not count as a "arbitrary factor," but can simply be assumed, in the light of the jury's unbounded freedom to ignore any legislated specifications at "the third plane," to have had "an inconsequential impact," *Zant v. Stephens, supra,* slip op. at 7, on the decision of each of the twelve jurors who deliberated on Stephens' fate. If the statutory aggravating circumstances served to guide the jury in its sentencing task, this result could not be defended either as a matter of state law or due process, see *Hicks v. Oklahoma,* 447 U.S. 343 (1980). Yet the result is here permitted upon the precise premise that a Georgia sentencing jury needs not, and so presumably will not, pay attention to the legislative enumeration of aggravating circumstances; nor will these serve as any basis for the Georgia Supreme Court's review of the jury's ultimate choice of death as punishment.

Such extraordinary departures from sentencing procedures which this Court once believed to be central to the Georgia system necessarily compel the Court to reevaluate that system. In the light of the newly-announced "state-law premises" of the system, precedent and reason require the Court to affirm the Fifth Circuit decision vacating Stephens' death sentence on the plain, ineluctable ground that he was sentenced to die under procedures indistinguishable from those condemned in *Furman v. Georgia,* 408 U.S. 238 (1972).[6] These Georgia procedures forthrightly permitted

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[6]The Court clearly recognized, in *Moore v. Illinois,* 408 U.S. 786, 800 (1972), that it possesses jurisdiction to vacate a death sentence imposed under an unconstitutional sentencing system, even when the Eighth Amendment issue was not the basis on which the Court has granted certiorari to review the case. Moreover, as Justice Stevens has recently observed, "there is no impediment to presenting [to the Court] a new argument as an alternative basis for *affirming* the decision below," *Illinois v. Gates,* ___ U.S. ___, 51 U.S.L.W. 3415, 3416 n.1 (U.S. Nov. 30, 1982) (No. 81-340) (Justice Stevens dissenting), *citing Hankerson v. North Carolina,* 432 U.S. 233, 240 n.6 (1977).

Stephens' jury, after determining that he was guilty of an aggravated murder, to exercise "absolute discretion," unguided and unchannelled by any legislative standards, in deciding whether he should live or die.

The inconsistency of such procedures with *Furman* is manifest. The only difference between Georgia's pre-*Furman* and post-*Furman* capital sentencing schemes, we are now authoritatively told, is that the "absolute discretion" previously conferred upon juries in all cases of murder convictions is now conferred only in cases of murder with one statutory aggravating circumstance. But *Harry Roberts v. Louisiana,* 431 U.S. 633 (1977), established that a mere narrowing of the categories of cases *eligible* for the death penalty does not obviate federal constitutional concern for the manner in which the death penalty is meted out among those eligible. Most States, of course, reserve death-penalty eligibility for cases of *first-degree* murder; and there can be no question of *Furman*'s applicability to forbid totally discretionary capital sentencing among first-degree murderers. *E.g., Moore v. Illinois,* 408 U.S. 786 (1972). Georgia does not recognize degrees of murder, but instead uses the finding of a single aggravating circumstance—which, in some other jurisdiction, might be labeled an "element" of first-degree murder—to demark the "second plane" which winnows "from all murder cases those in which the penalty of death is a possible punishment," *Zant v. Stephens, supra,* slip op. at 5. This difference in labels is too insubstantial to support a difference in result with life at stake.

Indeed, many state systems closely resembling that described by the Georgia Supreme Court were assessed by this Court in the wake of *Furman* and were uniformly adjudged to be insufficient under the Eighth Amendment to avoid the risk of arbitrary and capricious capital sentencing.

For example, the statute struck down in *Duling v. Ohio,* 408 U.S. 936 (1971), *rev'g* 21 Ohio St. 13, 254 N.E.2d 670 (1971), was narrowly drawn to permit a death sentence only for murder of a police officer (see Ohio Rev. Code Ann. §2901.04 (1953)), although the jury was given unlimited discretion to impose death once facts establishing both the murder and the aggravating factor had been found. The provision of bifurcated guilt and penalty phases—even when permissible penalty phase evidence was extended by stature to include the circumstances of the crime, the defendant's background and history, and other aggravating and mitigating factors, all to be assessed by the jury in its discretion—has been deemed by this Court insufficient alone to avoid the risk of arbitrariness. *See, e.g., Delgado v. Connecticut,* 408 U.S. 940 (1972), *rev'g,* 161 Conn. 536, 290 A.2d 338 (1971) (see Conn. Gen. Stat. Ann. §53-10 (1967)); *Moore v. Illinois, supra* (see Ill. Ann. Stat. ch. 38 §1-7 (1964); *Scoleri v. Pennsylvania,* 408 U.S. 934 (1972), *rev'g,* 432 Pa. 571, 248 A.2d 295 (1968) (see Pa. Stat. Ann. tit. 18 §4701 (1965)).

Four members of the Court have also identified "substantial questions under *Furman v. Georgia,* 408 U.S. 238 (1972), about the constitutionality of the Utah death penalty statute" involved in *Gilmore v. Utah,* 429 U.S. 1012, 1017-18 (1976) (Justice White, joined by Justices Brennan and Marshall, dissenting); *id.* at 1020 (Justice Blackmun, dissenting). That statute provided on its face for a bifurcated proceeding and required a unanimous jury finding of at least one aggravating circumstance (though at the guilt phase) before a death sentence could be imposed; it then left the jury free at sentencing to assess aggravating and mitigating evidence in its own discretion before returning a verdict of life or death. (See Utah Code Ann. § §76-5-202, 76-3-206,

76-3-367) (Supp. 1973)). It is instructive that, after the *Gilmore* opinions were handed down, the Utah Supreme Court has construed its statute to provide a far greater measure of jury guidance at the sentencing phase,[7] while the Georgia Supreme Court has now construed the Georgia statute to move precisely in the opposite direction.

In sum, if the Court is not disposed to affirm the vacation of Stephens' death sentence under the due process principles of *Stromberg* and *Street,* it faces the necessary task of assessing the constitutionality of that sentence under *Furman,* in the light of the "state-law premises" on which the Georgia Supreme Court has now announced that it rests. The outcome of the assessment cannot be doubted:

> "In *Furman v. Georgia,* 408 U.S. 238, the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Gregg v. Georgia, supra,* reaffirmed this holding:
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> > '[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' *Id.,* at 189 (opinion of Stewart, Powell, and Stevens, JJ.).
>
> A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' *Id.,* at 188, quoting *Furman v. Georgia, supra,* 408 U.S., at 313 (White, J., concurring).
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> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to

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[7]See *State v. Pierre,* 572 P.2d 1338 (utah 1977); *State v. Woods,* 648 P.2d 71 (Utah 1982).

tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.' *Gregg v. Georgia, supra,* 428 U.S., at 196, n.47. See also *Proffitt v. Florida,* 428 U.S. 242; *Jurek v. Texas,* 428 U.S. 262. It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' As was made clear in *Gregg,* a death penalty 'system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.' 428 U.S., at 195, n.46."

Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980) (plurality opinion).

III

EVEN IF (i) *STROMBERG* AND *STREET* DID NOT SO CLEARLY APPLY TO STEPHENS' CASE, AND (ii) GEORGIA'S "STATE-LAW PREMISES" DID NOT RENDER STEPHENS' DEATH SENTENCE UNCONSTITUTIONAL, THE SENTENCE WOULD HAVE TO BE VACATED, SINCE STEPHENS' JURY WAS INSTRUCTED IN A MANNER CALCULATED TO CREATE THE RISK THAT IT RELIED AT LEAST IN PART ON AN UNCONSTITUTIONAL AGGRAVATING CIRCUMSTANCE

Respondent Stephens has shown in Point I that his death sentence was imposed in violation of *Stromberg v. California* and *Street v. New York*. In Point II, he has demonstrated that the "state-law premises" outlined by the Supreme Court of Georgia on certification describe a capital sentencing system so open to arbitrary and capricious jury discretion that Stephens' sentence pursuant to it plainly violates *Furman v. Georgia*.

Yet even without consideration of the obvious constitutional infirmities of Georgia's new "pyramid" theory, it seems clear that Stephens' death sentence cannot survive the Georgia Supreme Court's opinion purporting to explain it, for *his* jury was never informed of the limited role that the Georgia Supreme Court has now assigned to statutory aggravating circumstances. Respondent Stephens, of course, is "entitled to have the validity of [his sentence] . . . appraised on consideration of the case as it was tried and as the issues were determined in the trial court," *Cole v. Arkansas*, 333 U.S. 196, 202 (1948); *accord, Presnell v. Georgia*, 439 U.S. 14, 16 (1978) *(per curiam); Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 92 (1965).

An examination of the instructions given to Stephens' jury reveals that the trial court repeatedly emphasized the significant function to be played by the statutory factors in the jury's deliberations. The trial court made repeated mention of those factors during its otherwise brief sentencing charge:

> "You may consider any of the following statutory aggravating circumstances which you find are supported by the evidence . . . [recites all statutory factors] . . . These possible statutory factors are stated in writing and will be out with you during your deliberations on the sentencing phase of this case. They are in writing here, and I shall send this out with you. If the jury verdict on sentencing fixes punishment at death by electrocution you shall

> designate in writing, signed by the foreman, the aggravating circumstances or circumstance which you have found to have been proven beyond a reasonable doubt. Unless one or more of those statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. If you fix punishment at death by electrocution you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable doubt. You would so state in your verdict . . . Now whatever your verdict may be with respect to the responsibility you have regarding sentencing please write these out, Mr. Foreman. . . ."

(J.A. 18-19).

Against its repeated references to the statutory aggravating factors, the court adverted to *evidence* only by its opening general observation that "in arriving at your determinations . . . you are authorized to consider all of the evidence received in court throughout the trial before you. You are further authorized to consider all facts and circumstances presented in extinuation [sic], mitigation and aggravation of punishment. . . ." (J.A. 18).

Viewing Stephens' case as it was charged to his jury, it is obvious that "[a] 'reasonable juror' could fairly conclude that he or she was required to place special emphasis on the existence of statutory aggravating circumstances, and weigh them against each other and against any mitigating circumstances, when deciding whether or not to impose the death penalty," *Zant v. Stephens, supra,* 72 L.Ed.2d at 234 (Justice Marshall, dissenting). If a reasonable juror could have so understood the sentencing charge—and that seems not merely one reasonable interpretation, but by far the most reasonable interpretation—then Stephens' death sentence can stand only if these instructions, as so understood, were constitutional. *See, e.g., Sandstrom v. Montana,* 442 U.S.

510, 519 (1979); *accord, Shuttlesworth v. City of Birmingham, supra,* 382 U.S. at 92.

Stephens has shown, however (see pp. 11-16, *supra*), that given such an interpretation, it is impossible for any reviewing court to know what role the unconstitutional statutory factor played in the decision of Stephens' jury to impose a death sentence. Faced with this uncertainty as to whether the unconstitutional factor may have been decisive for some jurors, the constitutional obligation to vacate Stephens' sentence and direct a new sentencing trial is clear, as the Fifth Circuit appropriately recognized. This obligation requires a reviewing court "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." *Eddings v. Oklahoma,* 455 U.S. 105, 119 (1982) (Justice O'Connor, concurring). The Fifth Circuit's judgment following that course should be affirmed, so that Stephens' fate can be determined by a properly instructed jury.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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Docket Sheet

NO. 81-89-CFH	TITLE	Walter ZANT, Warden, Petitioner v. Alpha Otis O'Daniel Stephens

DOCKETED	COURT
July 16, 1981	United States Court of Appeals for the Eleventh Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Daryl A. Robinson
	Counsel for Respondent: James C. Bonner, Jr.
July 16, 1981	Petition for writ of certiorari filed. (Record filed).
Aug. 17, 1981	Brief, amicus curiae by the Attorney General of Louisiana in support of the State of Georgia's petition for writ of cert filed.
Aug. 17, 1981	Motion of respondent for leave to proceed in forma pauperis and
Aug. 17, 1981	Brief of respondent in opposition filed.
Aug. 18, 1981	Brief amicus curiae of the State of Montana in support of petition for writ of certiorari filed.
Aug. 19, 1981	DISTRIBUTED SL21P3
Aug. 26, 1981	Reply brief for petitioner filed.
Oct. 5, 1981	The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.

Oct. 26, 1981	Certified original record on appeal & proceeding filed. (2 volumes)
Nov. 19, 1981	Brief, amicus curiae, of The Washington Legal Foundation filed.
Nov. 19, 1981	Joint appendix filed.
Nov. 19, 1981	Brief for the petitioner filed.
Nov. 21, 1981	Brief, amici curiae, of the States of Alabama, California, et al. in support of petitioner filed.
Dec. 17, 1981	Brief for the respondent filed.
Jan. 21, 1982	CIRCULATED.
Feb. 24, 1982	ARGUED.
May 3, 1982	Question of state law certified to Supreme Court of Georgia. "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" Dissenting opinion by Marshall, J., with whom Brennan, J joins. Dissenting opinion by Powell, J. (Opinion Per Curiam).
Oct. 29, 1982	Opinion received from Supreme Court of Georgia on question certified to that Court on May 3, 1982 filed.
Nov.	(Over)

81-89

Title

No.

DATE	PROCEEDINGS AND ORDERS
Nov. 8, 1982	DISTRIBUTED. 11-12. (Opinion received from Supreme Court of Georgia on question certified to that Court on May 3, 1982).
Nov. 15, 1982	The parties are invited to file within thirty days supplemental memoranda addressing the opinion of the Supreme Court of Georgia, Case No. 38763, decided Oct. 27, 1982, and its effect on the case pending before this Court.
Dec. 17, 1982	Supplemental brief of petitioner Walter Zant, Warden filed.
Dec. 20, 1982	Supplemental brief of respondent filed.
Dec. 22, 1982	DISTRIBUTED. 1-14. (Supplemental memoranda regarding answer to certified question - ENTERED on Dec. 17 as Supplemental brief of petitioner Walter Zant, etc).